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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KIMBERLY BELSHÉ, Director of the State Department of Health Services, State of California,

Petitioner,

vs.

ORTHOPAEDIC HOSPITAL and the CALIFORNIA ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

DANIEL E. LUNGREN
Attorney General of California
ROBERT L. MUKAI
Chief Assistant Attorney General
CHARLTON G. HOLLAND, III
Senior Assistant Attorney General
JOHN H. SANDERS
Supervising Deputy Attorney General
LAURIE ROBIN PEARLMAN
Deputy Attorney General
Counsel of Record
JONATHAN RUEBEL DAVIS
Deputy Attorney General
300 South Spring Street
Los Angeles, California 90013
(213) 897-2443
Counsel for Petitioner

16 pp

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of California
ROBERT L. MUKAI
Chief Assistant Attorney General
CHARLTON G. HOLLAND, III
Senior Assistant Attorney General
JOHN H. SANDERS
Supervising Deputy Attorney General
* LAURIE ROBIN PEARLMAN
Deputy Attorney General
JONATHAN RUEBEL DAVIS
Deputy Attorney General
* Counsel of Record
300 South Spring St.
Los Angeles, CA 90013
Telephone: (213) 897-2443
Counsel for Petitioner

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Defendant Kimberly Belshé, Director of the Department of Health Services of the State of California (hereinafter "the Department") hereby files her reply to the brief in opposition to the Department's Petition for Writ of Certiorari filed by plaintiffs, Orthopaedic Hospital (an acute care hospital) and the California Association of Hospitals and Health Systems (a hospital trade group), (hereinafter "the Hospitals").

ARGUMENT

I. THE FEDERAL GOVERNMENT'S PUBLIC STATEMENTS INDICATE THAT 42 U.S.C. SECTION 1396a(a)(30)(A) DOES NOT ESTABLISH A MINIMUM STANDARD OF REIMBURSEMENT RELATIVE TO PROVIDER COSTS

In their Opposition Brief, the Hospitals contend that the Ninth Circuit's interpretation of the "efficiency, economy, and quality of care" provision of 42 U.S.C. section 1396a(a)(30)(A) is consistent with the plain language of the statute. While 42 U.S.C. section 1396a(a)(13) ("the Boren Amendment"), which is not at issue herein) expressly requires payments to be "reasonable and adequate to meet the costs of efficiently and economically operated facilities," the "efficiency, economy, and quality of care" provision of 42 U.S.C. section 1396a(a)(30)(A) does not plainly impose a similar reimbursement standard. Since the statute is reasonably interpreted as addressing a state's efficient and economic administration of its Medicaid program, the federal government's interpretation of the statute is relevant and is entitled to great weight.

If the federal government intended to impose the requirement that rates compensate the costs of efficient and economic providers, it was capable of doing so, as it

did at 42 CFR section 447.253(b)(1), for rates for inpatient hospital services and long-term care facility services. The federal government's failure to explicitly state that the "efficiency, economy, and quality of care" does not impose a minimum payment standard, does not indicate that the federal government may secretly interpret the statute that way. The federal government's silence with respect to one possible interpretation of an ambiguous federal statute cannot be used to construe it, particularly when the federal government's only public statements support the Department's interpretation that the statute does not establish a minimum standard of reimbursement relative to provider costs. Furthermore, rates that comply with the new Ninth Circuit payment standard could well conflict with the federal upper limit payment standards.

II. THIS COURT HAS DISCRETION TO GRANT A PETITION FOR WRIT OF CERTIORARI TO HEAR ALL ISSUES NECESSARY TO RESOLUTION OF THE CASE; THIS COURT MAY CONSIDER THE SECTION 1983 ISSUE HEREIN

The Hospitals contend that this Court should not consider the issue of whether 42 U.S.C. section 1396a(a)(30)(A) creates a cause of action under Title 42 U.S.C. section 1983 because the issue was allegedly not presented or considered by the Ninth Circuit. The Hospitals do concede, however, that that precise issue was raised, extensively briefed, and argued at the District Court level and was included in the Petition for Writ of Certiorari, as well as in the Amici Curiae Brief. (Respondents' Brief at 16).

Since the Department had prevailed in the District Court on the ultimate issue (that its hospital outpatient reimbursement rates were valid), it did not file a cross-

appeal on the legal issue of whether the statutory provision created a private right of action for providers under 42 U.S.C. section 1983. However, it is important to consider that the very arguments which would be raised regarding the section 1983 issue were, in fact, extensively briefed in the Ninth Circuit. At pages 13-21 of the Appellee's brief in the Ninth Circuit, the Department extensively discussed *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 517-521, 110 S.Ct. 2510 (1990), in which the primary issue was whether the Boren Amendment created a right that was judicially enforceable under section 1983.

In its Ninth Circuit briefing distinguishing the Boren Amendment, the Department asserted that the "efficiency, economy, and quality of care" provision of 42 U.S.C. section 1396a(a)(30)(A) was not intended to benefit providers and that the statute and federal regulations lacked any guidance as to any clear, judicially enforceable minimum payment standard (Appellee's Brief, pp. 13, 14, and 20). Therefore, even though the Department did not file a cross-appeal on the section 1983 issue, the Ninth Circuit did have before it the precise arguments as to why the "efficiency, economy, and quality of care" provision of 42 U.S.C. section 1396a(a)(30)(A) failed to establish a judicially enforceable right, pursuant to the three-part analysis used by the Supreme Court in *Wilder*.

In prior decisions, this court has expressed its willingness to consider issues which were raised in the petition for writ of certiorari for the first time and even to consider issues of vital importance **sua sponte**. In *Vance* v. *Terrazas*, 444 U.S. 252, 258, n. 5, 100 S.Ct. 540, 544, n. 5 (1980), this Court considered an issue that had not been raised in the Court of Appeals nor included in the jurisdictional statement on appeal. The Court noted that its discretionary power to grant certiorari included the power to consider issues not presented in the Court of

Appeals. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320, n. 6, 91 S.Ct. 1434, 1438, n. 6 (1971).

The Court reasoned that the issue in question was key to resolution of the case and both parties had previously briefed the issue. *Vance*, 444 U.S. at 258, n. 5.

This Court has also granted certiorari on issues which have not been raised by either party in the lower courts or in the petition for writ of certiorari, but which were raised only in the amicus brief. *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 476-77, 97 S.Ct. 1898, 1902 (1977); See also *Teague* v. *Lane*, 489 U.S. 288, 300, 109 S.Ct. 1060, 1069 (1989). In the instant case, this issue was extensively briefed and argued in the District Court and is raised in the Amici Curiae brief, as well.

Moreover, a writ of certiorari may be granted to resolve an issue which may potentially affect a large number of claimants even if it was not raised below. See *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475, 112 S.Ct. 2589, 2594 (1992). This Court has wide discretion to grant certiorari on issues involving an important question of federal law which should be settled by the Supreme Court. See *Freytag* v. *Commisioner*, 501 U.S. 868, 873, 111 S.Ct. 2631 (1991) (holding that the strong interest of federal courts in maintaining constitutional plan of separation of powers warranted a grant of certiorari even though the issue was not heard below).

As the filing of an amici curiae brief by sixteen other states clearly indicates, this case has vital national importance, in which Supreme Court guidance is sorely needed. Moreover, Medicaid is a federal-state entitlement program; accordingly, each State would have a strong

stake in the outcome of this case. *Freytag*, 501 U.S. at 873.

Furthermore, in the instant case the Court cannot determine whether states must, in setting Medicaid reimbursement rates for the hospitals, consider actual costs and establish a rational relationship between the rates and efficient and economical hospitals' cost of providing quality services, without deciding whether the hospitals actually have a private right of action to enforce the standard adapted by the Ninth Circuit. Where, as here, an issue is so closely related to the principal issue on appeal, it may be deemed a subsidiary issue, fairly included in the main issue on appeal. See *Arkansas Elec. Coop.* v. *Arkansas Public Serv. Commn.*, 461 U.S. 375, 382 n.6, 103 S.Ct. 1905, 1911-12 n.6 (1983); *Caspari* v. *Bohlen*, 510 U.S. 383, 388-89, 114 S.Ct. 948, 952-53 (1994).

The Hospitals further contend that there is no conflict among the circuits as to whether section 1396a(a)(30)(A) creates a private right of action under section 1983. However, a close review of the other circuit court decisions reveals that their analysis of whether there was a private right of action focused on the "access" provision of section 1396a(a)(30)(A) and not the "efficiency, economy, and quality of care" provision. The "access" provision is a distinct and separate requirement of 42 U.S.C. section 1396a(a)(30)(A), which Congress enacted 22 years after the enactment of the "efficiency, economy, and quality of care" provision of that statute. The focus of the Department's argument in the instant petition for certiorari is that the "efficiency, economy, and quality of care" provision of section 1396a(a)(30)(A) does not create a judicially enforceable right.

III. THE PAYMENT STANDARD ADOPTED BY THE NINTH CIRCUIT DOES CONFLICT WITH THE OTHER CIRCUIT COURT DECISIONS

The Hospitals contend that because *Methodist Hospitals* v. *Sullivan*, 91 F.3d 1026 (7th Cir. 1996) primarily concerned the "access" provision of 42 U.S.C. section 1396a(a)(30)(A), it is not in conflict with *Orthopaedic Hospital* v. *Belshé*, 103 F.3d 1491 (9th Cir. 1997). However, in *Methodist Hospitals*, the Seventh Circuit implied that the adequacy of payment rates is judged by whether adequate access is achieved, and not by whether payments compensate a specific amount of provider costs, as required by the Ninth Circuit in *Orthopaedic*.

The Hospitals also contend that *Minnesota Homecare Association, Inc.* v. *Gomez*, 108 F.3d 917 (8th Cir. 1997) is not in conflict with *Orthopaedic* because the Eighth Circuit simply held that a state need not employ any particular rate-setting methodology. However, performing cost studies, determining efficient and economic provider costs, and paying rates that bear a reasonable relationship to such costs, as required by the Ninth Circuit in *Orthopaedic*, clearly constitutes a particular rate-setting methodology.

IV. THE DEPARTMENT REASONABLY COULD NOT EARLIER FOCUS ON THE POTENTIALLY DEVASTATING ADMINISTRATIVE AND FISCAL IMPACT OF THE PAYMENT STANDARD THE NINTH CIRCUIT UNEXPECTEDLY ADOPTED

The Hospitals contend that the Department did not raise the administrative problems resulting from the Ninth Circuit decision until the Department filed its Petition for Rehearing in the Ninth Circuit. The simple reason for

this was that, in the District Court and Ninth Circuit, the Hospitals advanced a wide variety of proposed payment standards, not just provider costs (e.g., they alleged that the rates were too low relative to actual provider costs, providers' usual charges, Medicare payment rates, other private health insurer payment rates, and the costs of efficient and economic providers to provide quality health care).

Because the Hospitals proposed such a wide variety of reimbursement standards, it was never clear what particular payment standard they were seeking. Accordingly, it was necessary for the Department to devote most of its briefing in both the District Court and the Ninth Circuit to addressing whether: (1) specific rate changes and the reimbursement system as a whole were consistent with "efficiency, economy, and quality of care," (2) rates complied with the "access" provision, and (3) federal law required any of the many different payment standards suggested by the Hospitals.

Given the statutory language, legislative history, and federal regulatory history, the Department reasonably considered it a remote possibility that either the District Court or the Ninth Circuit would adopt the Hospitals' suggestion that section 1396a(a)(30)(A) imposed a substantive payment standard similar to the Boren Amendment. Given that consideration and the other briefing required in this case, the Department did not focus on the potentially devastating administrative and fiscal impact of the payment standard that the Ninth Circuit ultimately adopted, until its petition for rehearing before the Ninth Circuit.

It is respectfully submitted that this court should consider the administrative and fiscal impact of this decision on whether to grant the petition for certiorari,

particularly in light of the impact of this decision on other states that did not participate in the lower court litigation.

The Hospitals also contend that the Department has exaggerated the administrative and fiscal impact of this decision because it is not clear that it applies to non-hospital outpatient services. While the Department welcomes the respondents' suggestion that the Ninth Circuit decision may only apply to hospital outpatient services, it has no doubt that other outpatient providers will argue in future lawsuits that *Orthopaedic* applies to payments for all outpatient services (Petition, Appendix E--Taylor Declaration, Paragraph 27). In fact, counsel for the Hospitals' has argued in other lawsuits brought against the Department that section 1396a(a)(30)(A) does, indeed, require that rates for non-hospital outpatient services must compensate the costs of efficient and economic non-hospital providers.

The Hospitals further contend that the Department's administrative concerns are exaggerated because annual hospital cost reports provide data on hospital costs, and that their expert's analysis did not take an enormous amount of time. However, the Hospitals' expert did not conduct the kind of analysis that the Ninth Circuit decision appears to require. Moreover, in spite of the availability of annual hospital cost reports, setting rates under the court's new standard will be an incredibly complicated and time-consuming task. There are over 600 hospitals from which data will need to be gathered and evaluated to determine rates for approximately 20,000 different hospital outpatient services (Petition, Appendix E---Taylor Declaration, Paragraphs 12-13).

The Hospitals contend that Medicare reimburses providers of outpatient services based on reasonable costs. However, the Department is not aware of any third party

payor, including the Medicare program, that establishes hospital outpatient rates based on the cost of each individual service, nor based on the efficient and economic cost of each of thousands of different services (Petition, Appendix E---Taylor Declaration, Paragraph 18).

V. THERE IS A STRONG BASIS TO EXPECT A POTENTIAL EXPLOSION OF FEDERAL COURT LITIGATION BASED UPON THE RULING BELOW IN ORTHOPAEDIC

The Hospitals contend that the Ninth Circuit decision in *Orthopaedic* "hardly foretells a litigation explosion," since there have only been five court of appeals decisions addressing the federal statute in its 29-year history. At the time *Wilder* was decided in 1990, there had been relatively few federal court decisions on the Boren Amendment. However, since the *Wilder* decision, there has been an explosion of lawsuits against states under the Boren Amendment. The Ninth Circuit's decision in *Orthopaedic* is likely to have a similar impact, at least in Ninth Circuit states.

Furthermore, the potential number of lawsuits in each state is greater than under the Boren Amendment, since there are thousands of different outpatient medical services, supplies, drugs, durable medical equipment, and other items. The Boren Amendment only apples to three general categories of inpatient services. In the Medi-Cal program, these are further subdivided into about 39 rate type categories (Appellee's Brief, Appendix E---Taylor Declaration, paragraph 20). At a minimum, the Ninth Circuit decision means that the Department must set rates for about 20,000 different hospital outpatient services, using a payment standard similar to that now applied under the Boren Amendment, to the daily rates for only about 39 inpatient service categories. Other types of

outpatient providers are likely to argue that this new payment standard is also applicable to at least another 20,000 other outpatient services, supplies, and items provided outside of a hospital setting. Therefore, there is great potential for an explosion of complicated federal court litigation based on *Orthopaedic*.

CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit, in the case at bar.

Dated: June 9, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California
ROBERT L. MUKAI
Chief Assistant Attorney General
CHARLTON G. HOLLAND, III
Senior Assistant Attorney General
JOHN H. SANDERS
Supervising Deputy Attorney General
LAURIE ROBIN PEARLMAN
Deputy Attorney General
JONATHAN RUEBEL DAVIS
Deputy Attorney General

Laurie R. Pearlman

LAURIE ROBIN PEARLMAN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner